EDITOR'S NOTE

PAGES _____ WERE POOR
HARD COPY AT THE TIME OF FILMING.
IF AND WHEN A BETTER COPY CAN BE
OBTAINED, A NEW FICHE WILL BE
ISSUED.

84-1898

Supreme Court, U.S.
FILED
JUN 6 1985
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

No.

JOHNNY BLACKMON, Petitioner

v.

OBSERVER TRANSPORTATION COMPANY, Respondent

COMMONWEALTH OF PENNSYLVANIA:
COUNTY OF PHILADELPHIA: ss

JACK M. BERNARD, being first duly sworn, upon his oath deposes and says:

1. I am the attorney for the petitioner, Johnny Blackmon, in the above-entitled proceeding, and have personal knowledge of all facts set forth in this affidavit.

2. Said petitioner is a veteran within the meaning of Supreme Court Rule 47 and Title 38 U.S.C. Sec.s 2021 et seq., the Veterans Reemployment Rights Act, and is a member of a Reserve Component of the Armed Forces of the United States, within the meaning of 38 U.S.C. Sec. 2024(b)(2) and 38 U.S.C. Sec. 2024(d).

3. Petitioner enlisted in the United States Army as a private in 1975. He was on active duty until 1977, and thereafter remained a member of the United States Army Reserves up to and including the date of this affidavit.

4. In September 1981, petitioner went on active duty training at summer camp in the United States Army, after first having requested leave of absence to attend active duty training, as is required of members of the United States Army Reserves. When he attempted to return to work after completion of active duty training, petitioner was told that respondent had discharged him during the time he was on active duty training.

5. On October 23, 1981, petitioner filed a civil action in the United States District Court For The Western District Of North Carolina, Charlotte Division to establish his reemployment rights under the law. Following trial, a judgment adverse to petitioner was entered, and thereafter affirmed by the United States Court of Appeals For The Fourth Circuit on March 5, 1985.

6. Petitioner has filed his petition for certiorari in this Court.

JACK M. BERNARD, ESQUIRE
AFFIANT

Sworn to and subscribed
before me this [illegible] day
of June, 1985

Notary Public

GINGER MICHAELS
Notary Public, Phila., Phila. Co.
My Commission Expires Jan. 26, 1989

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

No.

JOHNNY BLACKMON, Petitioner

v.

OBSERVER TRANSPORTATION COMPANY, Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

JACK M. BERNARD, ESQUIRE
SUITE 1644, SUBURBAN STATION BUILDING
1617 J. F. KENNEDY BOULEVARD
PHILADELPHIA, PENNSYLVANIA 19103
(215) 665-0666
ATTORNEY FOR PETITIONER

D. GERALD COKER, ESQUIRE
PAULA A. HILBURN, ESQUIRE
FORD AND HARRISON
1400 HARRIS TOWER
233 PEACHTREE STREET, N.E.
ATLANTA, GEORGIA 30303
ATTORNEYS FOR RESPONDENT

QUESTION PRESENTED FOR REVIEW

DOES THE SEVENTH AMENDMENT GUARANTEE TRIAL BY JURY IN AN ACTION BROUGHT BY A MEMBER OF THE UNITED STATES ARMED FORCES RESERVES TO OBTAIN COMPENSATION FOR LOST WAGES AND REINSTATEMENT TO HIS FORMER EMPLOYMENT, WHEN THE COMPLAINT FILED UNDER THE VETERANS REEMPLOYMENT RIGHTS ACT, 38 U.S.C. SEC. 2022, ALLEGES THAT THE EMPLOYER WRONGFULLY TERMINATED THE RESERVIST, IN VIOLATION OF SECTION 2024(d) OF THE ACT?

TABLE OF CONTENTS

	Page
Opinions Below	1
Jurisdiction	1
Statute Involved	1
Statement of Case	2
Reasons For Granting Writ	3
Appendix A	11
Opinion and Judgment of the United States Court of Appeals For The Fourth Circuit, Johnny Blackmon, Appellant v. Observer Transportation Co., Appellee, No. 82-2107 (Consolidated for purposes of rehearing in banc with William P. Troy, Appellee v. City of Hampton, a Virginia Municipal Corporation, et al., Appellant, No. 82-1862)	1
Order and Opinion of the United States District Court For The Western District of North Carolina, Charolotte Division, Johnny Blackmon, Plaintiff v. Observer Transportation Company, Defendant, Civil Action No. C-C-81-0480 P, filed October 28, 1982	29
Memorandum and Order of the United States District Court For The Western District of North Carolina, Blackmon v. Observer Transportation Company filed June 16, 1982	33
Order of the United States Court of Appeals For The Fourth Circuit directing rehearing in banc filed October 7, 1983	35

TABLE OF AUTHORITIES

	Page
Albemarle Paper Co. v. Moody, 422 U.S. 405, 95 S. Ct. 2362, 45 L. Ed2d 280 (1975)	6, 8
Alexander v. Chrysler Corporation, 92 CCH Labor Cases para. 13,077, pp. 18,929-30 (6th Cir. 1981)	4
Blackmon v. Observer Transporation Co. 756 F2d 1000 (4th Cir. 1985)	1, 3, 9
Curtis v. Loether, 415 U.S. 183, 94 S. Ct. 1005, 38 L. Ed2d 260 (1974)	4, 8
Gruca v. United States Steel Corp., 495 F2d 1252 (3rd Cir. 1974)	4
Parklane Hosiery Co. v. Shore, 439 U.S. 322, 99 S. Ct. 645, 58 L. Ed2d 552 (1979)	7
Ross v. Bernhard 386 U.S. 531, 90 S. Ct. 733, 24 L. Ed2d 729 (1970)	4, 9

CONSTITUTIONAL PROVISIONS

Constitution Of The United States, Article I, Section 8, Clauses 12-14	7
Constitution Of The United States, Amendment 7	1

STATUTES

28 U.S.C. Sec. 1254(1)	1
38 U.S.C. Sec. 2022	2, 3, 4, 5, 6, 8,
38 U.S.C. Sec. 2024	5
38 U.S.C. Sec. 2024(d)	2
42 U.S.C. Sec. 2000e-5(g)	5
42 U.S.C. Sec. 3612(c)	4

MISCELLANEOUS

Page

United States Senate Report No. 93-907,
93rd Congress, 2nd Session, pp. 111-112 6

OPINIONS OF THE COURTS BELOW

The Opinion of the United States Court of Appeals For The Fourth Circuit is reported at 756 F2d 1000 (4th Cir. 1985), and is set forth in Appendix A hereto, infra, page 1 . The judgment and opinion of the United States District Court For The Western District of North Carolina, Charlotte Division is unreported and is set forth in Appendix A hereto, infra, p. 29.

JURISDICTION

The judgment of the Court of Appeals was entered on March 5, 1985. The jurisdiction of this Court is invoked pursuant to Title 28, United States Code, Section 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Seventh Amendment states that:

"Trial by jury in civil cases.

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

The relevant portion of Title 38, United States Code, Section 2024(d) states:

> "Any employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 2021(a) [38 USCS §2021(a)(A), (B)] shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training, or upon such employee's discharge from hospitalization incident to that training, such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes."

The relevant portion of Title 38, United States Code, Section 2022 states:

> "Enforcement procedures
>
> If any employer, who is a private employer or a State of political subdivision thereof, fails or refuses to comply with the provisions of section 2021(a), (b)(1), or (b)(3), or section 2024 [38 USCS § 2021(a), (b)(1) or (b)(3) or 2024], the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions. The court shall order speedy hearing in any such case and shall advance it on the calendar."

STATEMENT OF THE CASE

Petitioner, a member of the United States Army Reserves was employed by Observer Transportation Company as a truck driver in 1981. He left for summer training camp on September 21, 1981. His employment was terminated involuntarily because Observer contended petitioner failed to request a leave of absence prior to his departure for training camp, as required by 38 U.S.C. Sec. 2024(d).

Petitioner filed suit in the United States District Court For The Western District of North Carolina or October 23, 1981. Jurisdiction was based on 38 U.S.C. Sec. 2022.

Petitioner requested a jury trial. Observer moved to strike petitioner's demand. An order and opinion of the District Court granted the motion to strike. The Court's Memorandum and Order entered on June 15, 1982 is set forth in Appendix A, page 33.

Petitioner testified at trial that he did request a leave of absence and introduced testimony of several fellow employees as corroboration. Observer's witnesses testified that no such request was made. After a nonjury trial, the Court decided that the weight of the evidence supported the employer's defense and entered judgment accordingly.

Petitioner appealed the judgment to the District Court to the Court of Appeals, asserting that denial of his request for trial by jury was contrary to the Seventh Amendment. Oral argument before a panel of judges of the Court of Appeals was heard on June 7, 1983. By order entered on October 7, 1983, the Court of Appeals, on its own motion directed rehearing in banc. The Court's order directing rehearing in banc is set forth in Appendix A, page 35.

The Court consolidated this appeal with an appeal from the United States District Court For The Eastern District of Virginia, at Newport News, "William P. Troy vs. City of Hampton, et al.", Civil Action No. 81-152-NN, for purposes of oral argument in banc.

The consolidated appeals were argued on December 5, 1983, and were decided on March 5, 1985. In Blackmon, the Court of Appeals affirmed the judgment of the District Court. In Troy, the Court reversed the judgment of the District Court permitting a jury trial, and remanded for a nonjury trial.

REASONS FOR GRANTING THE WRIT

The Court of Appeals divided five to four as to the right to a jury trial in cases brought under 38 U.S.C. Sec. 2022. The decision of the Court expressed a determination that petitioner's remedy was equitable, and that compensation for lost wages was incidental to the granting of equitable relief. The United States

Court of Appeals For The Third Circuit has held that the remedy afforded by 38 U.S.C. Sec. 2022 is legal in nature, but did not address the jury trial issue, Gruca v. United States Steel Corp., 495 F2d 1252, 1256-1257 (3rd Cir. 1974). The United States Court of Appeals For The Sixth Circuit has ruled that there is no right to a jury trial under the Act, Alexander v. Chrysler Corporation, 92 CCH Labor Cases Para. 13,077, p. 18,929-30.

The Supreme Court decided that the statutory remedy afforded by Title VIII of the Civil Rights Act of 1968, 42 U.S.C. Sec. 3612 entitled the person seeking relief to trial by jury, Curtis v. Loether, 415 U.S. 183, 94 S. Ct. 1005, 38 L. Ed2d 260 (1974). 42 U.S.C. Sec. 3612(c) provides that "the court may grar as relief, as it deems appropriate, any permanent or temporary injunction, temporary restraining order, or other order, and may award to the plaintiff actual damages and not more than $1,000 punitive damages,.. ".

In its opinion, at 415 U.S. 194, the Court stated:

> "Whatever doubt may have existed should now be dispelled. The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies enforceable in an action for damages in the ordinary courts of law."

There is a three-pronged test to the Seventh Amendment right to jury trial: Whether the issue to be tried is legal or equitable depends upon the custom with reference to such question prior to the merger of law and equity courts, the remedy sought, and the practical abilities and limitations of juries to decide the issues. Ross v. Bernhard, 386 U.S. 531, 90 S. Ct. 733, L. Ed2d 729 (1970).

The remedy afforded by 38 U.S.C. Sec. 2022 is not discretionary, once it is established that the reemployment rights of a person protected by 38 U.S.C. Sec. 2024 have been violated. Congress deemed it necessary for the defense of the United States to provide military personnel with the right to reemployment upon completion of active duty, active duty for training or inactive duty for training. The district courts of the United States were granted the power "specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action."

No particular form of action is specified. It is not even necessary to commence a civil action for relief. Read literally, the law states that the district court shall have the power, "upon the filing of a motion, petition, or other appropriate pleading by" the person entitled to the benefits of such provisions,..." to order compliance.

The legislation contrasts strikingly with Title VII of the Civil Rights Act of 1964, 42 U.S.C. Sec. 2000e-5(g), with which the Reemployment Rights Act was analogized by the majority opinion in the case at bar. Title VII is denominated as providing equitable relief. The district courts are authorized to fashion broad injunctive affirmative actions to redress unlawful employment discrimination, with a range of statutory remedies, "with or without back pay..., or any other equitable relief as the court deems appropriate." (emphasis supplied)

Petitioner contends there is no analogy between Title VII and 38 U.S.C. Sec. 2022, except that both concern redress for employer violations of federally protected employment rights. The rights relate to employer-employee relationships in both statutes.

The remedies, however, are quite different. Enforced compliance with the Reemployment Rights Act by the employer is not discretionary, once a violation is established. The court may not refuse to enforce compliance; nor may the court reject an application for compensation for lost wages and benefits.

As stated in the minority opinion of the Court of Appeals in the case at bar, the issue is highlighted by the concurring opinion of Mr. Justice Rhenquist in Albermarle Paper Co. v. Moody, 422 U.S. 405, 95 S. Ct. 2362, 45 L. Ed2d 280 (1975), at 422 U.S. 442-443:

> "But precisely to the extent that an award of backpay is thought to flow as a matter of course from a finding of wrongdoing, and thereby becomes virtually indistinguishable from an award for damages, the question (not raised by any of the parties, and therefore quite properly not discussed in the Court's opinion), of whether either side may demand a jury trial under the Seventh Amendment becomes critical.
>
> Id. at 422.
>
> To the extent, then, that the District Court retains substantial discretion as to whether or not to award backpay notwithstanding a finding of unlawful discrimination, the nature of the jurisdiction which the court exercises is equitable, and under our cases neither party may demand a jury trial. To the extent that discretion is replaced by awards which follow as a matter of course from a finding of wrongdoing, the action of the court in making such awards could not be fairly characterized as equitable in character, and would quite arguably be subject to the provisions of the Seventh Amendment.
>
> Id. at page 443."

The legislative history is not controlling. Congress amended the Act in 1974, so that no state statute of limitations would bar a proceeding under 38 U.S.C. Sec. 2022. Reference to "equitable principles of law" in United States Senate Report No. 93-907, 93rd Congress, 2nd Session, pp. 111-112 cited and quoted in the majority opinion below makes specific reference to the "provision at the end of this section...", i.e. the prohibition

against state stautes of limitation, and a preference for case by case application of the doctrine of laches.

To conclude that the Congressional purpose of preserving the employment rights of military personnel uniformly, and preventing abridgment of those rights by state statutes of limitation is a preference for equity jurisprudence misreads both the Act and the Congressional history.

The Seventh Amendment is not subject to Congressional curtailment. If the right of a veteran or reservist to recover compensation for lost wages and obtain reemployment is absolute, there is no discretion to be exercised by a court of equity, and no basis to refuse trial by jury. Congress created a statutory remedy that is analogous to the common law right of an employee to sue for compensation for lost wages that existed when the Seventh Amendment was ratified in 1791. See Parklane Hosiery Co. v. Shore 439 U.S. 322,333, 99 S. Ct. 645 58 L. Ed2d 552 (1979), and the separate dissenting opinion of Mr. Justice Rhenquist at 439 U.S. 337-346. Such an action would be tried on the law side of the Court, as distinguished, for example, from a suit for a preliminar and permanent injunction to restrain the employer from violations of the contract of employment, where there is no adequate legal remedy.

Congress has Article I, Section 8, Clauses 12, 13, and 14 powers to raise and support armies, provide and maintain a Navy and make rules for the Government and Regulation of the land and naval Forces. It has exercised those powers to provide for a secure peacetime military reserve training program.

If equity jurisprudence is to govern relationships between private and public sector employers and reservists, the orderly administration of military training programs could be adversely

affected. An employee with military reserve obligations could be called upon to choose between his job and his military commitment, if the employer felt a "crisis" necessitated the employee's presence on the job, after a leave of absence had been requested. Should a court of equity "balance" the employer's needs with the employee's reserve obligations, and uphold a discharge where the employer's needs are determined to be legitimate and compelling? An affirmative answer would undermine the peacetime reserve training program, which is and should be paramount.

It is contended that the Veterans Reemployment Rights Act imposes an absolute duty on employers to permit a military leave of absence when requested by a reservist, and an absolute right to enforce compliance and award compensation for lost wages. It is precisely the type of case contemplated in Mr. Justice Rhenquist's concurring opinion in Albemarle Paper Co., supra.

Where the right is absolute and the remedy of backpay and reinstatement is not discretionary, the Seventh Amendment guarantees trial by jury.

It was error to deny petitioner a jury trial. The question presented has not been addressed by this Court since Curtis v. Loether, supra., construing Title VII of the Civil Rights Act of 1964, which Congress designated as an equitable remedy involving sweeping discretionary powers.

Certiorari should be granted to resolve the conflict between the Third, Fourth and Sixth Circuits concerning the legal or equitable nature of the remedy afforded by 38 U.S.C. Sec. 2022, and to extend the right to trial by jury to statutory causes of action involving employer-employee relations where there is a common law analog.

Should it have been necessary for the reservist in the Troy case, which was consolidated with Blackmon, to retry the issue of whether he was terminated for alleged insubordination, or for going to reserve training, when such an issue was surely within the "practical abilities and limitations" of the jury that heard the evidence? cf. Ross v. Bernhard, supra., Is it necessary or appropriate to deny petitioner Blackmon the right to have a jury in his locality decide whether Observer's foreman heard petitioner's request for a leave of absence, or whether a request was actually made, when such questions of fact are easily within the grasp of jurors' practical abilities?

Section 2022 of the Veterans Reemployment Rights Act offers the Court an opportunity to clarify jurisprudence under the Seventh Amendment, and to remove the uncertainty in the federal courts as to what types of statutory actions involving claims for money damages coupled with reinstatement of job benefits are subject to trial by jury.

Respectfully Submitted,

JACK M. BERNARD
Attorney for Petitioner

AFFIDAVIT OF SERVICE BY MAIL

COMMONWEALTH OF PENNSYLVANIA:
ss
COUNTY OF PHILADELPHIA:

I, Jack M. Bernard, depose and say that I am the attorney of record for Johnny Blackmon, the petitioner herein, and that on June 3, 1985, pursuant to Rule 28, Rules of the Supreme Court, I served one (1) copy of the foregoing Petition For Writ of Certiorari on each of the parties to be served herein, as follows:

On Observer Transportation Company, Respondent, by mailing the copy of the Petition in a duly addressed envelope, with first class postage prepaid to D. Gerald Coker, Esquire, and Paul A. Hilburn, Esquire, Ford and Harrison, counsel of record for said Observer Transportation Company at their offices at 1400 Harris Tower, 233 Peachtree Street, N.E., Atlanta, Georgia 30303.

Jack M. Bernard
JACK M. BERNARD, ESQUIRE
Attorney For Petitioner

Sworn to and subscribed
before me this 3rd day
of June, 1985

Ginger Michaels
Notary Public

GINGER MICHAELS
Notary Public, Phila., Phila. Co.
My Commission Expires Jan. 26, 1986

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1984

No.

JOHNNY BLACKMON, Petitioner

v.

OBSERVER TRANSPORTATION COMPANY, Respondent

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

APPENDIX A

PUBLISHED

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-1862

William P. Troy,

Appellee,

City of Hampton, a Virginia Municipal Corporation, Thomas Miller, City Manager of the City of Hampton, Virginia, John B. Petty, City Assessor of the City of Hampton, Virginia, and Michael A. Monteith, Director of Support Services, City of Hampton, Virginia,

Appellants.

Appeal from the United States District Court for the Eastern District of Virginia, at Newport News. John A. MacKenzie, Chief District Judge. (C/A 81-152-NN)

Argued: December 5, 1983 Decided: March 5, 1985

Before WINTER, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN and CHAPMAN, Circuit Judges, sitting en banc.

W. Stephen Moore, Chief Deputy City Attorney (A. Paul Burton, City Attorney on brief) for Appellant; John L. Smith, Jr. (Benjamin A. Hubbard, Outland, Gray, O'Keefe & Hubbard on brief) for Appellee.

APPENDIX A

No. 82-2107

Johnny Blackmon,

Appellant,

vs

Observer Transportation Co.,

Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. Robert D. Potter, District Judge. (C/A 81-0480)

Argued: December 5, 1983 Decided: March 5, 1985

Before WINTER, Chief Judge, RUSSELL, WIDENER, HALL, PHILLIPS, MURNAGHAN, SPROUSE, ERVIN and CHAPMAN, Circuit Judges, sitting en banc

Jack M. Bernard for Appellant; D. Gerald Coke (Paula A. Hilburn, Ford & Harrison on brief) for Appellee.

CHAPMAN, Circuit Judge:

These two appeals have been consolidated for en banc consideration. Each case involves the question of whether the seventh amendment guarantees a right to a trial by jury in a suit to enforce a statutory cause of action for reinstatement to employment and compensation for lost wages under the Veterans Reemployment Rights Act (the Act), 38 U.S.C. §§ 2021 et seq. We find that there is no constitutional right to a jury trial under the Act and that to try such an action to a jury was error. We affirm in Blackmon (82-2107) and we reverse and remand in Troy (82-1862).

I

Both Blackmon and Troy claimed rights under 38 U.S.C. § 2024(d)[1] which covers absences from employment for reserve

[1] The relevant portion of § 2024(d) provides:

> Any employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 2021(a) shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty for training or inactive duty training or upon such employee's discharge from hospitalization incident to the training, such employee shall be permitted to return to such employee's position with such seniority, status, pay, and vacation as such employee would have had if such employee had not been absent for such purposes.

military training and reemployment rights following such absences. Blackmon was denied relief because the court found that he had not complied with the Act in that he failed to request leave for military training in advance of taking such leave.

Troy was granted leave for military training by his employer, the City of Hampton, but he was discharged, shortly after his return from reserve training, for alleged insubordination. Troy claimed the insubordination charge was pretext and that the real reason for his discharge was retaliation for his taking a six month leave from his employment to engage in military training.

In Blackmon, the district court held that an action brought under the Act was equitable in nature and it denied Blackmon's request for a jury trial. In the trial to the court, the verdict was for the defendant. In Troy, the district court denied the defendant's motion for a trial to the court and the ensuing jury trial resulted in a verdict for the plaintiff.

II

Most courts which have considered the rights and remedies created by the Veterans Reemployment Rights Act have found them to be equitable in nature. E.g., Bunnell v. New England Teamsters and Trucking Industry Pension Fund, 486 F.Supp. 714 (D.Mass.

1980) aff'd, 655 F.2d 451 (1st Cir. 1981), cert. denied, 455 U.S. 908 (1982); Goodman v. McDonnell Douglas Corp., 456 F.Supp. 874 (E.D. Mo. 1978), aff'd., 606 F.2d 800 (8th Cir. 1979), cert. denied, 446 U.S. 913 (1980); Ufland v. Buffalo Courier Express, 394 F.Supp. 199 (W.D.N.Y. 1974).

It is argued that the remedy of back pay is more appropriately characterized as compensatory, legal damage, and therefore warrants a jury trial. While two cases are cited to support this argument, Setser v. Novack Investment Co., 638 F.2d 1137 (8th Cir. 1981) and Burt v. Abel, 585 F.2d 613 (4th Cir. 1978), they do not apply because each deals with back pay claims derived from other statutory causes of action. Setser was brought under 42 U.S.C. § 1981 (1976) and Burt under 42 U.S.C. § 1983 (1976). In the one case that has held that there is a seventh amendment right to a jury trial under the Act, Steffen v. Farmers Elevator Service Co., 109 F.Supp. 16, 20 (N.D.Iowa 1952), the plaintiff sought only monetary relief which the court held to be legal and not reinstatement, which the court found to be equitable.

The Third Circuit has held that the back pay provided as a remedy under 38 U.S.C. § 2022 is legal in nature. See Gruca v. United States Steel Corp., 495 F.2d 1252, 1256-1257 (3rd Cir. 1974). This finding was in the context of whether to apply a statute of limitations or the doctrine of laches to an action found to be both legal and equitable. Gruca does not address the jury trial issue. For two reasons, we decline to follow Gruca.

First, we are convinced by the 1974 amendments to the Veterans Reemployment Rights Act and the legislative history accompanying these amendments that Congress intended the remedies provided under the Act to be equitable in nature. Included in the 1974 amendments is a provision that no state statute of limitations shall apply to any proceedings under the Act. The report of the Senate Committee on Veterans Affairs contains an explanation of this amendment:

> There is also added a provision at the end of this section which reaffirms and reflects more clearly the congressional intent that the legal proceedings under this chapter shall be governed by equitable principles of law, especially by barring the application of state statutes of limitation to any such proceedings. Congress, in 1940, omitted any reference to the application of any time barred defense in cases arising under this law, in part to insure the application of a policy of keeping enforcement rights available to returned veterans as uniform as possible throughout the country. The equity doctrine of laches accomplishes this purpose as nearly as possible. (emphasis added). S.Rep. No. 93-907, 93rd Cong., 2d Sess. at 111-12.

Congressional intent that proceedings be governed by equity principles clearly indicates that Congress found the rights and remedies established by the Act to be equitable in nature.

Second, the remedies provided under the Act are analogous to those provided under Title VII of the Civil Rights Act of 1964,

42 U.S.C. § 2000e-5(g). We held in Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971) that a back pay award under Title VII is equitable in nature. The Fifth Circuit has described the back pay remedy provided under Title VII as "an integral part of the statutory equitable remedy, to be determined through the

---

[2] The relevant portion of the Veterans Reemployment Rights Act, 38 U.S.C. § 2022 states as follows:

> If any employer, who is a private employer or a State or political subdivison thereof, fails or refuses to comply with the provisions of section 2021(a),(b)(1), or (b)(3), or section 2024, the district court of the United States for any district in which such private employer maintains a place of business, or in which such State or political subdivision thereof exercises authority or carries out its functions, shall have the power, upon the filing of a motion, petition, or other appropriate pleading by the person entitled to the benefits of such provisions, specifically to require such employer to comply with such provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action. Any such compensation shall be in addition to and shall not be deemed to diminish any of the benefits provided for in such provisions.

The relevant portion of 42 U.S.C. § 2000e-5(g) states:

> . . . the court may enjoin the respondent from engaging in such unlawful employment practice, and order such affirmative action as may be appropriate, which may include, but is not limited to reinstatement, or hiring of employees, with or without back pay . . ., or any other equitable relief as the court deems appropriate.

exercise of the court's discretion, and not by a jury." Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969).

The language of 38 U.S.C. § 2022 states that the district court "shall have the power" to require an employer to comply with the provisions of the Veterans Reemployment Rights Act and to compensate an employee for wages or benefits lost because of the employer's unlawful action. The back pay remedy provided here is discretionary with the district court and "is an integral part of the equitable remedy of reinstatement," Smith v. Hampton Training School for Nurses, 360 F.2d 577, 581 n.8 (4th Cir. 1966).

In Pons v. Lorillard, 549 F.2d 950 (4th Cir. 1977) we stated that a monetary award for back wages is traditionally a legal remedy. However, that statement referred to an award for back wages under the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1976). The relevant portion of that statute describes the remedy which a court may grant for age discrimination as "legal or equitable relief."

The equitable nature of the remedies under the Act is well described in Ufland v. Buffalo Courier Express, Inc., 394 F.Supp. 199 (W.D.N.Y. 1974):

> In suits brought under the Veterans Reemployment Act, a veteran sues "as a veteran asserting special rights bestowed upon him in furtherance of the federal policy to protect those who have served in the Armed Forces". McKinney v. Missouri-Kansas-Texas Railroad Co., 357 U.S. 265, 78 S.Ct. 1222, 2 L.Ed. 2d 1305 (1958). Whether the veteran's claim is for reinstatement and back pay, restitution of seniority rights or wage rate adjustments does not alter the basically equitable nature of the rights asserted. The claim for back wages in this case is, therefore, a derivative of plaintiff's rights of reinstatement and restoration to his former seniority, status and pay under the Act, rather than a claim at law for damages. Id. at 200-201.

The legislative history of the Veterans Reemployment Rights Act and the decisions of the courts which have considered the issue persuade us that claims under 38 U.S.C. § 2021 et seq. are equitable in nature and must be tried to the court.

III

In Troy it is argued that the use of a jury was either harmless error, or constituted the use of an advisory jury pursuant to Rule 39(c) Federal Rules of Civil Procedure.

In Troy it can be argued that there is no constitutional right to a nonjury trial, and any error in allowing a trial by jury would be harmless. However, this overlooks the clear intent of Congress that suits under this Act should be handled nonjury. A finding of harmless error would be an unclear signal to district courts, which could be misled into allowing jury trials in other actions that clearly require trials to the Bench.

If only one reasonable verdict was possible from the evidence, harmless error would have strong appeal, but such is not the case. From a review of the record this is a very close case and presents a good lesson as to why a bench trial with findings of fact and separately stated conclusions of law under Rule 52, Federal Rules of Civil Procedure is required. In close cases the losing parties' right to appellate review can be prejudiced where there is a general jury verdict and the appellant was entitled to the benefit of the separate findings and conclusions provided by Rule 52.

Troy argues that since the district court has the power to empanel an advisory jury under Rule 39(c) it is not reversible error for the court to exercise this discretion. In the present case the district court did not use an advisory jury under Rule 39(c), but conducted a normal jury trial with the jury answering "yes" to the question: "Is plaintiff entitled to recover under U.S.C. § 2024(d) (Military Leave: Rehire)". In Cox v. Babcock and Wilcox Company, 471 F.2d 13 (4th Cir. 1972) we held that even the use of an advisory jury did not relieve the court of the necessity of making its own findings and conclusions and that appellate review should occur as if there had been no verdict of an advisory jury. Such was not done by the district judge in Troy.

Therefore, we affirm Blackmon (82-2107) and we reverse Troy (82-1862) and remand Troy for a nonjury trial.

ERVIN, Circuit Judge, dissenting:

I respectfully dissent from the majority's view that a veteran seeking reinstatement and back pay under the Vietnam Era Veterans' Readjustment Assistance Act of 1974 (38 U.S.C. §§ 2021-2026) is not entitled to a jury trial. I would affirm in Troy and reverse in Blackmon.

My disagreement in Troy is not based upon the theory that the district court used an advisory jury because the trial judge did not purport to do so and the procedural prerequisites under Fed. R. Civ. P. 39(c) for the use of an advisory jury were never followed. By the same token, I do not disagree with the majority opinion's premise that the Act itself does not provide for a trial by jury. If a right to a jury trial exists in this case the entitlement must come from the Constitution.

A. Right To Jury Trial

The seventh amendment provides that

> In suits at common law where the value in controversy shall exceed twenty dollars, the right to trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any court of the United States than according to the rules of the common law.

As an initial premise, I believe that those who seek to vindicate their constitutional right to a jury trial should be accorded the benefit of the doubt because "[t]he federal policy favoring jury trials is of historic and continuing strength," Simler v. Connor, 372 U.S. 221, 222 (1963), and thus "the clear

duty of a district court [is] to resolve the doubt in favor of the constitutionally protected right that issues of fact . . . be tried by a jury." Ochoa v. American Oil, 338 F. Supp. 914, 923 (S.D. Tex. 1972).

The historical vitality and fundamental character of the right to a jury trial in civil cases preserved by the seventh amendment predates the Constitution and even the Revolution. In 1774, Chief Justice Chew of the Pennsylvania Supreme Court stated that "every security depends in an English country" on the jury's prerogative to determine the facts. Hurst v. Dippo, 1 Dal 20, 21 (Pa. 1774). The authors of our Declaration of Independence specifically mentioned the loss "in many cases, of the benefits of trial by jury" under British rule as one of the "abuses and usurpations . . . design[ed] to reduce them under absolute despotism." The Declaration of Independence paras. 2, 21 (U.S. 1776). Echoing this colonial view of trial by jury, the Declaration of Rights and Grievances of the Stamp Act Congress written in 1765 provided "[t]hat trial by jury is the inherent and invaluable right of every British subject in these colonies." Consonant with this view of trial by jury, Justice Black wrote that Alexander Hamilton "divided the citizens of his time between those who thought that jury trial was a 'valuable safeguard to liberty' and those who thought it was 'the very palladium of free government.'" Galloway v. United States, 319 U.S. 372, 397-98 (1942)(Black, J., concurring and dissenting).

More recently, the Supreme Court has reaffirmed the unwavering American belief in jury trials by recognizing that "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." Dimick v. Schiedt, 293 U.S. 474, 486 (1935). This historic faith in jury trials is not unfounded. Thomas Jefferson considered "trial by jury as the only anchor ever yet imagined by man, by which a government can be held to the principles of its constitution." 3 Writings of Thomas Jefferson 71 (Washington ed.). On a more practical level, our enduring support for the jury system also reflects the implicit assumption "that twelve men know more of the common affairs of life than does one man; that they can draw wiser and safer conclusions from admitted facts thus occurring, than can a single judge." Sioux City & Pacific R.R. Co. v. Stout, 84 U.S. (17 Wall.) 657, 664 (1874). Only against this historical background of the jury can the question of whether there is an entitlement to a jury trial under the Veterans' Act be answered.

At the core of the seventh amendment lies a precise literal meaning. Despite this precision, however, the seventh amendment has not been completely unaccommodating to the creation of new causes of action that did not exist in 1791. Like other constitutional rights that have undergone historical assimilation,

the seventh amendment has shown the ability to expand to encompass new situations and new causes of action undreamed of in 1791.[1]

Recognizing the seventh amendment's literal meaning, courts have uniformly held that a litigant bringing an action which would have been tried to a jury at common law must be permitted a jury trial today. That, of course, is the provision's plain meaning. Nevertheless, it is also established beyond dispute that

> [w]hether or not a close equivalent . . . existed in England in 1791 is irrelevant for Seventh Amendment purposes, for that Amendment requires trial by jury in actions unheard of at common law, provided that the action involves rights and remedies of the sort traditionally enforced in an action at law, rather than an action in equity or admiralty.

Pernell v. Southall Realty, 416 U.S. 363, 375 (1974)(applying the seventh amendment to a District of Columbia statute for the recovery of property); see also Parsons v. Bedford, 28 U.S.

---

[1]The right to a civil jury does not fit easily into Justice Frankfurter's famous dichotomy between the "[g]reat concepts like . . . 'due process of law,'" which were intentionally left imprecise so as "to gather meaning from experience," and the Constitution's "strict definition[s] of power [and] specific limitations upon it" which are "defined and circumscribed with precision." National Mutual Ins. Co. v. Tidewater Transfer Co., 337 U.S. 582, 656-7 (1949)(Frankfurter, J., dissenting). The "strict definition" and "specific limitations" Justice Frankfurter had in mind were the provisions of Article III -- a section of the Constitution which not everyone finds as free of imprecision as did Justice Frankfurter. The seventh amendment has a precise literal meaning at its core, but like Frankfurter's "great concepts," it has shown the ability to expand creatively to include new situations not originally contemplated by our Constitution's framers.

(3 Pet.) 433, 446-47 (1830)(appellate courts cannot review de novo jury determinations of fact in any case not based on equity or admiralty jurisdiction at common law).

1. The Jury Trial Test

Curtis v. Loether, 415 U.S. 189 (1974), is the leading recent Supreme Court decision in this area. In Curtis, the district court ruled that neither the statute nor the Constitution entitled a Fair Housing Act plaintiff to a jury trial. The Supreme Court unanimously affirmed the decision of the Court of Appeals reversing that ruling. The Court noted that it had "often found the Seventh Amendment applicable to causes of actions based on statutes." Id. at 193. Because the plaintiffs' statutory cause of action in Curtis "sounds basically in tort -- the statute merely defines a new legal duty, and authorizes the courts to compensate a plaintiff for the injury caused by the defendant's wrongful breach. . . . [T]he relief sought here -- actual and punitive damages -- is the traditional form of relief offered in the courts of law." Id. at 195-6. The court declined to rule that "any award of monetary relief must necessarily be 'legal' relief," and it cited, without endorsing, the unanimous view of the federal circuit courts that backpay in Title VII suits is an equitable rather than a legal remedy. Id. at 196-97. Ignoring their common genesis and remedial purposes, the Court reasoned that in Title VII cases the decision to award backpay is discretionary with the court, while in Fair Housing Act cases, "[t]here is no comparable discretion[:] if a plaintiff proves unlawful

discrimination and actual damages, he is entitled to judgment for that amount." Id. at 197.

After Curtis, plaintiffs proceeding under a statute may demonstrate a seventh amendment jury right by satisfying a three part test variously prescribed by the courts.

> As our cases indicate, the "legal" nature of an issue is determined by considering, first, the pre-[law and equity] merger custom with reference to such questions; second, the remedy sought; and, third, the practical abilities and limitations of juries. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply.

Ross v. Bernhard, 396 U.S. 531, 538 n.10 (1970).

This circuit has articulated this same test as follows:

> The ultimate analysis to determine whether a suit is one "at common law" within the Amendment seems to be the three-pronged classical test: (1) Is the issue legal rather than equitable under the custom of the courts of law; (2) Is the remedy legal; and (3) Is the issue triable to a jury given the jurors' practical abilities and limitations?

Pons v. Lorillard, 549 F.2d 950, 953 (4th Cir. 1977), aff'd, 434 U.S. 575 (1978).

Whether a particular statutory cause of action gives rise to a seventh amendment jury right has seldom proven an easy question to answer. The Supreme Court accepted by implication the appeal courts' ruling that Title VII

plaintiffs are not entitled to a jury trial in Albemarle Paper Co. v. Moody, 422 U.S. 405, 415-16 (1975)(all remedies under Title VII are discretionary and equitable in character). Whether that decision is controlling on this point, however, is not beyond theoretical, if not practical, question. Concurring in the opinion and judgment of the majority in Albemarle Paper, Justice Rehnquist wrote separately to highlight the implications of the Court's holding for Title VII plaintiffs' rights to a jury. Justice Rehnquist warned:

> But precisely to the extent that an award of backpay is thought to flow as a matter of course from a finding of wrongdoing, and thereby becomes virtually indistinguishable from an award for damages, the question (not raised by any of the parties, and therefore quite properly not discussed in the Court's opinion), of whether either side may demand a jury trial under the Seventh Amendment becomes critical.

Id at 442.

> To the extent, then, that the District Court retains substantial discretion as to whether or not to award backpay notwithstanding a finding of unlawful discrimination, the nature of the jurisdiction which the court exercises is equitable, and under our cases neither party may demand a jury trial. To the extent that discretion is replaced by awards which follow as a matter of course from a finding of wrongdoing, the action of the court in making such awards could not be fairly characterized as equitable in character, and would quite arguably be subject to the provisions of the Seventh Amendment.

Id. at page 443. Because he agreed with the Court that the language and policy of Title VII indicates that the trial

courts are to use their discretion in shaping remedies, Justice Rehnquist concluded, but with noticeable hesitancy, that Title VII backpay awards are "not simply a thinly disguised form of damages." Id. at 446.

2. Application of the Jury Trial Test

Not surprisingly, courts have been sharply divided over whether the seventh amendment requires a jury trial in cases involving the Age Discrimination in Employment Act, compare Pons v. Lorillard, 549 F.2d 950 (4th Cir. 1977)(holding that ADEA plaintiff is constitutionally entitled to a jury trial), aff'd, 434 U.S. 575 (1978)(on statutory grounds only), with Morelock v. NCR Corp., 546 F.2d 682 (6th Cir. 1976), vacated, 435 U.S. 911 (1978)(no right to jury in ADEA cases), or 42 U.S.C. § 1981; compare Moore v. Sun Oil Co., 636 F.2d 154 (6th Cir. 1980)(no jury right in § 1981 backpay suit), with Setser v. Novack Investment Co., 638 F.2d 1137 (8th Cir. 1981)(§ 1981 backpay suit gives rise to jury right). Cf. Setser, 454 U.S. 1064, 1066-67 (1981) (White, J., dissenting from denial of certiorari)(Supreme Court should grant certiorari to resolve dispute between Setser and Moore). While most courts have rejected jury demands in Veterans' Act cases, see, e.g., Mowdy v. Ada Board of Education, 76 F.R.D. 436 (E.D. Okla. 1977), some have held that the seventh amendment right attaches to plaintiffs seeking backpay under the Act. See Grica v. United States Steel Corp., 495 F.2d 1252 (3d Cir. 1974); Steffen v. Farmers Elevator Service Co., 109 F. Supp. 16 (N.D. Iowa 1952).

a. Characterizing the Remedies Available In Veterans' Act Cases as Either Legal Or Equitable

In Troy, the City relies on our recent en banc decision in Paxman v. Campbell, 612 F.2d 848 (4th Cir. 1980), cert. denied, 449 U.S. 1129 (1981), to support the proposition that backpay is intrinsically an equitable remedy regardless of the statute under which it is sought. Under a close examination of Paxman, a § 1983 case, I do not think it can be read so broadly. The decision in Paxman splintered the court badly, evoking five separate opinions from the sitting judges. The City's specific citation is to Judge Winter's opinion, expressing his views and those of Judges Butzner and Hall. Judge Winter wrote that where backpay is sought "incident to reinstatement," it is an equitable remedy against which state defendants cannot raise the qualified immunity defense of good faith. 612 F.2d at 866 n.7. Judge Winter was thus rejecting the view expressed in Judge Widener's opinion, joined in the relevant section by Judge Russell only, that the Supreme Court's decision in Morrell v. Department of Social Services, 436 U.S. 658 (1978), "has ended any distinction, sometimes made, between backpay and money damages." 612 F.2d at 857. Judge Widener concluded from this that the good faith immunity available to state officials in a § 1983 damages action is also available in § 1983 backpay suits, the two forms of relief both being "monetary . . . relief." Id. at 858.

Chief Judge Haynsworth, writing separately, agreed with Judge Winter on the equitable character of backpay incident

to reinstatement, and rejected Judge Widener's claim that Morrell changed anything. Id. at 861-62. Judge Phillips, also writing separately, agreed with Judge Widener that "Morrell may well have required a general reexamination of any supposed distinctions for immunity purposes between legal and equitable monetary claims," but did not find it necessary to make such a reexamination. Id. at 875 n.2 (Phillips, Cir. J., concurring and dissenting).

As a consequence, Paxman obviously sheds little light on the present case. Indeed, only Judge Phillips explicitly noted that the argument over the continuing validity of "the arcane distinction between legal and equitable remedies" had any seventh amendment repercussions. Id.

As indicated above, because most of the Veterans' Act case law characterizes backpay awards under the Act as equitable in character, courts have rejected attempts by plaintiffs to invoke the seventh amendment. Where, as here, a Veterans' Act plaintiff seeks both backpay and reinstatement, the majority view discusses the backpay claim as a "derivative of plaintiff's rights of reinstatement," Ufland v. Buffalo Courier Express, Inc., 394 F. Supp. 199, 201 (W.D. N.Y. 1974), and "a basic part of the equitable claim for reinstatement." Cox v. City of Kansas City, 76 F.R.D. 459 (W.D. Mo. 1977). The decisions supporting the majority view have also relied on the applicability of the equitable doctrine of laches rather than statutes of limitations

to Veterans' Act timeliness questions. Id. at 460. Neither of these considerations is determinative and therefore this court should consider the question afresh in light of Curtis and of Justice Rehnquist's concurrence in Albemarle Paper.

b. Veterans' Act Cases Satisfy the Three Part Jury Trial Test

Regarding the existence of a common law analog under the first prong of the Curtis test, it is clear that a wrongfully discharged servant had at least two remedies at common law. Ochoa v. American Oil Co., 338 F. Supp. 914, 918 (S.D. Tex. 1972)(holding that Title VII plaintiffs should be entitled to a jury trial under the seventh amendment).[2] The servant could bring an action for indebitatus assumpsit seeking the "functional equivalent of backpay," or for breach of contract by seeking "compensatory damages for lost wages." Id. The existence of these common law analogs to a Veterans' Act backpay suit strongly suggests that the availability of a jury trial for such suits is guaranteed under the seventh amendment.

The second prong of the Curtis test requires us to ask whether the Act creates a definite legal right which may

---

[2]Although District Judge James L. Noel, Jr.'s brilliant and scholarly opinion in Ochoa convincingly demonstrated that there were at least two analogs at common law to a Title VII backpay suit, he reluctantly bowed to binding precedent and denied Ochoa's demand for a jury trial. 338 F. Supp. at 923. While Judge Noel's discovery of two common law analogs for backpay suits did not bear fruit in the Title VII area, these common law analogs are manifestly relevant to an analysis of Veterans' Act backpay suits under the first prong of the Curtis test.

be vindicated by a legal remedy. Justice Rehnquist's concurrence in Albemarle Paper suggests, I believe correctly, that a crucial question is the degree of discretion the statute provides in shaping and awarding a remedy once liability is shown. More precisely, "[t]o the extent that [awards of backpay] follow as a matter of course from a finding of wrongdoing, the action of the court could not be fairly characterized as equitable in character." 422 U.S. at 443.

On the related issue of whether the remedies under the ADEA are by nature legal or equitable, this court has relevantly recognized that

> claims of employment discrimination, coupled with prayers for lost wages, are analogous to the common law action for breach of contract by wrongful discharge or an action in tort, with the Age Act creating the legal duty.

Pons, 549 F.2d at 954. In Troy, the Veterans' Act placed a legal duty upon the City not to prejudice Troy because of his absence due to military activities. Once it is shown that this duty has been violated, timeliness issues aside, relief in the form of backpay and reinstatement necessarily follows. It is true that some early cases held that the remedies afforded by the Veterans' Act are discretionary with the district court. See, e.g., Levine v. Berman, 178 F.2d 440, 445 (7th Cir. 1949). But see Teamsters Local 612 v. Helton, 413 F.2d 1380, 1384-85 (5th Cir. 1969)(expressing doubt that the district court has discretion to deny recovery of backpay); Van Doren v. Van Doren Laundry Service, 162 F.2d 1007, 1010-11 (3d Cir. 1947)(citing conflicting

legislative history on whether backpay was intended to be mandatory without resolving the issue). The Act is a remedial statute intended to serve the vital national goal of maintaining a strong defense by protecting veterans, reservists, and members of the National Guard from employment prejudice due to their military service. See generally Monroe v. Standard Oil Co., 452 U.S. 549 (1981). Consequently, it is "to be liberally construed for the benefit of those who . . . serve their country." Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 275, 285 (1946). Unlike Title VII, the Veterans' Act does not create an "equitable structure" of relief, Moll v. Perleside Livonia Credit Union, 525 F. Supp. 786, 793 (E.D. Mich. 1981), with an investigative and enforcement agency, administrative procedures and remedies, and a broad grant of discretion to trial courts to shape remedies that are adequate and just. Rather, the Veterans' Act creates a single avenue of relief and two specific remedies. It is therefore more related to the ADEA which, this court has held, provides back-pay as a legal remedy, Pons, 549 F.2d at 954, than to Title VII, which is equitable in character.

The majority opinion places great emphasis upon the legislative history of the Act, especially the 1974 amendments. Apart from these amendments, there is little support for either side in the meager legislative history. Considering the 1974 changes, it is true that the label "equitable" is used -- loosely, I suggest -- in those discussions, but the actual language of the proviso gives the best clue to the purpose of Congress:

> Providing further, that no State statute of limitations shall apply to proceedings under this section.

In the ensuing text, the statute stresses the effect that court decisions applying short statutes of limitations have had upon veterans' claims and the ability of the Department of Labor to settle claims in jurisdictions in which there were short statutes of limitations. These holdings are described as operating "to the detriment of the veteran who must rely, in most cases, on the assistance of the Government to vindicate his claim." Congress was primarily concerned with the uncertain and unfair application of state statutes of limitations to these veterans' claims. To correct this difficulty, Congress decided that uniformity could best be achieved by applying the doctrine of laches instead of state statutes of limitations of widely varying lengths; hence the addition of the proviso to section 9(d). When viewed in light of what Congress was disturbed about, and its reasons for acting, this legislative history does not answer the issue of whether the veteran is entitled to a jury trial under the Act.[3]

---

[3]Regarding the right to a jury trial, the legislative histories behind Title VII and the Veterans' Act establish another valid distinction between these two remedial antidiscrimination enactments. On numerous occasions, Congress considered and rejected proposed amendments to grant parties the right to a jury trial in actions brought under Title VII. See, e.g., 110 Cong. Rec. 14, 182 (1964) (Senate rejected amendment offered by Senator Thurmond to make violations of Title VII subject to jury trial); 118 Cong. Rec. 4919-20 (1972)(Senate rejected Senator Ervin's proposed amendment to permit either party to demand a jury trial in any civil action brought under Title VII). Congress feared that juror bias, especially in the South, might frustrate the enforcement and remedial purposes of Title VII. See, e.g., 110 Cong. Rec. 8660 (Remarks of Senator Morse), 9819 (Remarks of Senator Javits),

Applying the three prong test of Curtis, I conclude:

(1) There are common law analogs to these proceedings in the actions for indebitatus assumpsit and breach of contract for wrongful discharge, both of which were tried to a jury.

(2) The Act creates a definite legal right which may be vindicated by a legal remedy. Unlike Title VII, the court has very little, if any, discretion in shaping the remedy. Title VII specifically provides that the district court may shape relief with or without backpay. Although Title VII envisions great discretion in shaping a remedy, with or without backpay, the Veterans' Act requires compensation of full backpay whenever a violation of the Act occurs. The Act states that if the veteran prevails, the court "shall have the power . . . specifically to require such employer to comply with such [reemployment] provisions and to compensate such person for any loss of wages or benefits suffered by reason of such employer's unlawful action." 38 U.S.C. § 2022 (emphasis added). Also, a monetary award for backpay is a traditional legal remedy. Pons, 549 F.2d at 954.

Footnote 3 continued:

125958 (Remarks of Senator Humphrey)(1964). There is even some evidence that this congressional fear was not completely unfounded. See Morgan, Segregated Justice, in Southern Justice 163 (L. Friedman ed. 1963). Congress did not, however, consider whether the right to a jury trial should be expressly permitted in actions arising under the Veterans' Act. More important, I cannot conceive of any juror prejudice against veterans that would seriously impede the enforcement of the Act. Simply put, there is no pervasive societal prejudice against veterans in contrast to the racial discrimination that Congress believed would, if jury trials were permitted, destroy the efficacy of Title VII. Accordingly, the legislative history behind Title VII and the Veterans' Act reveals that, while there were compelling reasons not to provide jury trials in Title VII cases, these reasons are entirely absent in Veterans' Act claims.

(3) There can be no doubt that a jury is fully capable of hearing and resolving a controversy of this character.

B. Harmless Error

Although only a few cases appear to have addressed the issue, the erroneous granting of a jury trial must be deemed harmless error. Under Rule 61 of the Federal Rules of Civil Procedure "[n]o error . . . in any ruling . . . by the court . . . is ground for granting a new trial . . . or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice" or adversely affects the substantial rights of the parties. From this language, it is clear that harmless error does not establish precedent, rather it affects only the party litigants by avoiding an unnecessa remand. Equally plain, where an error below does not prejudice the substantial rights of the parties, an appellate court must find that the error was harmless and refuse to reverse and remand.

There is old but persuasive precedent in the Fourth Circuit for the proposition that the erroneous granting of a jury trial in an equitable action is harmless error. Great American Insurance Co. v. Johnson, 25 F.2d 847, 850 (4th Cir. 1925); cert. denied, 278 U.S. 629 (1928). Fidelity Casualty Co. v. Glenn, 3 F.2d 913, 915 (4th Cir. 1925); see also Hurwitz v. Hurwitz, 136 F.2d 796, 798-99 (D.C. Cir. 1943)(citing Johnson with approval); 11 C. Wright and K. Graham, Federal Practice and Procedure § 2887 (1977). But see Cargill, Inc. v. Commodity Credit Corp., 275 F.2d 745, 750-51 (2d Cir. 1960)(grant of jury

trial was prejudicial). Recognizing the absence of prejudice when one is given a jury trial even though there is no such right, Judge Parker reasoned in Johnson that

> [t]he distinction between law and equity has not been abolished by the recent statutes regulating procedure, and a party is entitled to have his case tried on the proper side of the docket; but the question here is not whether it was error to try an equity case as an action at law, but whether this court should hold such error to be prejudicial and award a new trial, where all of the evidence in the lower court is before us, where it appears that the case was fully developed, and where the relief obtained at law is exactly what upon the record should have been awarded in equity? We think not. In such case justice has been done, and courts exist to do justice, not to furnish a forum for intellectual skill or prowess.

25 F.2d at 850. Judge Parker then concluded that "[i]f the decision of the lower court in such case accords with what we deem the rights of the parties in equity, the error in trying the case at law should be treated as harmless, and the judgment affirmed." Id. Although Johnson was decided before the merger of law and equity, its reasoning applies with equal force today.

In this case, the parties got more than they bargained for -- a jury trial. Try as I might, I have been unable to perceive the prejudice that either party suffered because they erroneously received a jury trial. Absent some evidence of juror bias, the erroneous grant of a jury trial cannot be

considered sufficiently prejudicial to warrant reversal and retrial. Our jurisprudence seeks only substantial justice, not procedural and adjudicative perfection. Therefore, were I to conclude that there is no right to a jury trial under the Veterans' Act, I would hold that the granting of a jury trial below was harmless error and affirm in Troy.

Nevertheless, because I am persuaded that the seventh amendment requires a jury trial under the Veterans' Act, I would affirm the judgment in Troy without reaching the issue of harmless error and reverse the judgment in Blackmon.

I am authorized to state that Judge Russell, Judge Widener, and Judge Murnaghan join in this dissent.

FILED
CHARLOTTE, N.C.
OCT 28 1982
U.S. DISTRICT COURT
W. DIST. OF N.C.

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

JOHNNY BLACKMON,

Plaintiff

v.

OBSERVER TRANSPORTATION COMPANY,

Defendant.

CIVIL ACTION NO. C-C-81-0480-P

RECEIVED
OCT 28 1982
GILLESPIE & LESESNE

ORDER

Plaintiff, a member of the United States Army Reserves, brought this action under §§ 2021 and 2024(d) of the Vietnam Era Veterans Readjustment Assistance Act, 38 U.S.C. § 2021 et seq., alleging that he was unlawfully discharged from employment by Defendant because of his attendance at military reserve training camp. On October 12, 1982, this Court heard testimony relative to Plaintiff's claim and accepted exhibits into evidence.

For the reasons set forth below, the Court finds that Plaintiff has failed to establish that he was discharged because of his military service in violation of 38 U.S.C. §§ 2021 and 2024(d).

Section 2024(d) of the Vietnam Era Veterans Readjustment Assistance Act provides in pertinent part:

> An employee not covered by subsection (c) of this section who holds a position described in clause (A) or (B) of section 2021(a) shall upon request be granted a leave of absence by such person's employer for the period required to perform active duty for training or inactive duty training in the Armed Forces of the United States. Upon such employee's release from a period of such active duty or inactive duty training. . . such employee shall be permitted to return to such employee's position with such seniority, status, pay and vacation as such employee would have had if such employee had not been absent for such purposes.

The statute requires that a reservist request a leave of absence from his employer in order to attend training camp. The legislative history of the Universal Military Training and Service Act, 50 App. U.S.C. § 459, the predecessor statute to the Vietnam

Era Veterans Readjustment Assistance Act, reveals that Congress' purpose in requiring reservists to request leave was to afford employers advance notice of employees' planned absences from work.

When Congress amended the Universal Military Training and Service Act to repeal the requirement that persons submitting to examination to determine their physical fitness for military service must request leave, the Senate Report contrasted the situations of examination rejectees and reservists like Plaintiff:

> A rejectee's situation is different from that of reservists and members of the National Guard who leave their jobs repeatedly for short tours of training. The repetitive nature of their absences makes it desirable that the employer be informed concerning the schedule of absences, and the requirement of a request for leave would continue to apply in such cases.

Senate Report No. 1070, 1961 U.S. Code and Administrative News § 3319. See also U.S. Department of Labor, Veterans Reemployment Rights Handbook (1970) ("Unlike those having reemployment rights by virtue of full active duty or initial active duty for training, [the reservist] must request a leave of absence from his employer. . . .")."

Plaintiff, a city truck driver for Defendant, claimed that during a meeting of the city drivers on August 28, 1981, some three weeks before he left for training camp on September 21, 1981, he made the requisite request for leave to his supervisor, Ralph Belk, and Belk assigned another driver to cover Plaintiff's route during his absence. Even assuming that notice given in a general meeting of the drivers would have constituted a request within the meaning of the Act, Plaintiff's claim must be dismissed because he failed to establish that such a request was made.

Plaintiff's claim that he requested and was granted leave during the August 28 meeting was not corroborated by the driver witnesses and was denied by Belk. Although several drivers testified that they heard Plaintiff make a statement regarding reserve camp during the meeting, none of them could testify that Belk responded to Plaintiff or gave any indication that he had heard

Plaintiff's remarks. Plaintiff's testimony that Belk assigned another driver, Henry Watts, to cover his route was refuted by Watts and Belk and not corroborated by any other witness. Belk credibly testified that Plaintiff failed to request a leave of absence in the August 28 meeting or at any other time in 1981.

The evidence established that Defendant has employed several individuals who were members of the reserves and has routinely allowed these employees, upon request, to take leaves of absence for the performance of their military obligations as the statute requires employers to do. Belk, himself, was a reservist from 1969 until 1981 and attended training camp each year until 1980. In 1978 and 1979 Belk and Plaintiff attended camp together.

In order to obtain a leave of absence for military training, Defendant required only that an employee request leave from his immediate supervisor in advance. In addition to Defendant's written policy requiring employees to request leaves of absence in advance, Belk had repeatedly told the employees in driver meetings, including a meeting in early summer 1981, that they were required to notify him as far in advance as possible when they needed a leave of absence for military training purposes. The purpose of the requirement was to ensure that Defendant could schedule employees and plan work schedules in advance so as to minimize the disruption to its business.

Plaintiff was aware of Defendant's policy and had requested leave from Belk in each of the three years of his employment with Defendant prior to 1981. Plaintiff was routinely granted leave in each instance.

The evidence supports Defendant's position that Plaintiff was discharged not because of his military service and obligations, but because of his failure to request a leave of absence from his employer, a statutory requirement which must be met to entitle an employee to the reinstatement rights afforded by the statute.

Inasmuch as Plaintiff has failed to establish that he requested a leave of absence, he is not entitled to reinstatement.

Accordingly, the Court directs that judgment be entered in favor of the Defendant in this action and against Plaintiff. ~~Each party shall pay his or its costs incurring~~ including attorney's fees.

IT IS SO ORDERED.

ROBERT C. POTTER
UNITED STATES DISTRICT JUDGE
10/26/82

IN THE DISTRICT COURT OF THE UNITED STATES
FOR THE WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

FILED
CHARLOTTE N C

U S DISTRICT COURT
W DIST OF N C

C-C-81-480-P

JOHNNY BLACKMAN,

Plaintiff,

vs.

OBSERVER TRANSPORTATION COMPANY,

Defendant.

MEMORANDUM AND ORDER

THIS MATTER is before the Court for ruling upon Defendant's motion to strike Plaintiff's request for a jury trial in this action brought under the Veterans Reemployment Rights Act, 38 U.S.C. §2021 et seq. (1976).

The Court being of the opinion that the motion to strike should be granted, enters the following Memorandum and Order:

DISCUSSION

The interpretation of the nature of a claim brought under the Veterans Reemployment Rights Act appears to be of first impression in our Circuit. However, the reported cases which have considered the issue have found such claims to be equitable.

The most recent holding to that effect is Russell v. New England Teamsters and Trucking Industry Pension Fund, 486 F.Supp. 714, 719 (D. Mass. 1980), aff'd., 655 F.2d 451 (1st Cir. 1981), cert. denied, 102 S.Ct. 1253 (U.S. Jan 18, 1982), in which the court cited Goodman v. McDonnell Douglas Corp., 456 F.Supp. 874 (E.D. Mo. 1978), aff'd., 606 F.2d 800 (8th Cir. 1979), cert. denied, 446 U.S. 913 (1980). See also, Strelitz v. Surrey Classics, Inc., 7 F.R.D. 181 (D.C.N.Y. 1946); Cosgrove v. Ohio Bell Tel. Co., 11 F.R.D. 303 (D.C. Ohio 1951).

In Howdy v. Ada Board of Education, 76 F.R.D. 436 (E.D. Okla. 1977), the court held that there was no right to a jury trial under the Act, after analogizing the issues and remedies under the Veterans Reemployment Rights Act to those under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e-5. The Court quoted Offland v. Buffalo Courier Express, 394 F.Supp. 199, 200-201 (W.D.N.Y. 1974):

> Whether the veteran's claim is for reinstatement and back pay, restitution of seniority rights or wage rate adjustments does not alter the basically equitable nature of the rights asserted. The claim for back wages in this case is, therefore, a derivative of plaintiff's rights for reinstatement and restoration to his former seniority, status and pay under the Act, rather than a claim at law for damages.

Howitz, supra, at 437.

We find this analysis cogent and the analogy to Title VII well-founded. See, Robinson v. Lorillard Corp., 444 F.2d 791 (4th Cir. 1971); Smith v. Hampton Training School for Nurses, 360 F.2d 577 (4th Cir. 1966)(en banc); and Great American Federal Savings & Loan Association v. Novotny, 442 U.S. 366, 375 n. 19 (1979) (finding no right to a jury trial in a Title VII case). The monetary relief available under the Veterans Reemployment Rights Act "is an integral part of the statutory equitable remedy, to be determined through the exercise of the court's discretion, and not by a jury." Johnson v. Georgia Highway Express, Inc., 417 F.2d 1122, 1125 (5th Cir. 1969).

IT IS THEREFORE ORDERED that the Defendant's motion to strike Plaintiff's request for a jury trial be granted.

This the 15th day of June, 1981.

ROBERT D. POTTER
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-2107

Johnny Blackmon, Appellant,

versus

Observer Transportation Company, Appellee

ORDER

Upon consideration of the issues, a poll of the court having been requested, and in the poll all the active circuit judges having voted to direct rehearing in banc in this case:

IT IS ADJUDGED AND ORDERED that this case be reheard in banc.

FOR THE COURT - BY DIRECTION

WILLIAM K. SLATE, II
CLERK

FILED
OCT 7 1983
U.S. Court of Appeals
Fourth Circuit